



**Department of Energy**  
Washington, DC 20585

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October 29, 2008

Via E-filing

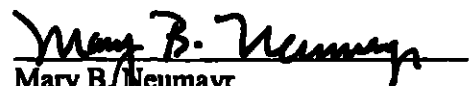
The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W  
Washington, DC 20423-0001

Re STB Finance Docket No 35106  
United States Department of Energy --  
Rail Construction and Operation --  
Caliente Rail Line in Lincoln, Nye, and  
Esmeralda Counties, Nevada

Dear Acting Secretary Quinlan:

Enclosed for filing in the above referenced proceeding is the United States Department of Energy's Reply to Norfolk Southern Corporation's Motion for Leave to File Response

Sincerely,

  
Mary B. Neumayr  
Deputy General Counsel  
for Environment & Nuclear Programs



**UNITED STATES OF AMERICA**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No 35106**

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**UNITED STATES DEPARTMENT OF ENERGY  
-RAIL CONSTRUCTION AND OPERATION--  
CALIENTE RAIL LINE IN LINCOLN, NYE,  
AND ESMERALDA COUNTIES, NEVADA**

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**UNITED STATES DEPARTMENT OF ENERGY'S REPLY TO  
NORFOLK SOUTHERN CORPORATION'S  
MOTION FOR LEAVE TO FILE RESPONSE**

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**Attorneys for Applicant  
United States Department of Energy**

For the reasons stated below, the United States Department of Energy ("DOE") respectfully requests that the Surface Transportation Board ("Board" or "STB") deny Norfolk Southern Corporation's ("Norfolk Southern") Motion for Leave to File Response, dated October 10, 2008 ("Motion for Leave"). Accompanying the Motion for Leave is Norfolk Southern's proposed Response to Reply of the United States Department of Energy ("Proposed Response").

#### **BACKGROUND**

On March 17, 2008, DOE filed its Application for a Certificate of Public Convenience and Necessity ("Application") to construct and operate an approximately 300-mile rail line in Nevada to be known as the Caliente Rail Line. On April 16, 2008, the Board published a notice in the *Federal Register* (73 Fed. Reg. 20748) announcing DOE's Application. In the notice, the Board adopted a procedural schedule that provided a comment period more expansive than that prescribed in the Board's regulations. The Board allowed a 120-day period for interested parties to submit comments in support of or in opposition to the Application, instead of the 35-day period set forth in the Board's regulations.

Norfolk Southern filed a notice of intent to participate in the proceeding but did not to file any comments on the Application notwithstanding the extended comment period. Nor did Norfolk Southern seek a further extension of the comment period or seek leave to file late comments.

Other persons, including CSX Transportation, Inc. ("CSXT"), did submit comments on the Application. CSXT attached to its comments a DOE Policy Statement for Use of Dedicated Trains for Waste Shipments to Yucca Mountain ("DOE Policy

Statement"). Noting that the DOE Policy Statement calls for the use of dedicated trains as the mode of "usual" rail transport and that the Application also discusses the use of dedicated trains on the Caliente Rail Line, CSXT requested a condition requiring DOE to use dedicated trains on CSXT rail lines for shipments of spent nuclear fuel and high-level radioactive waste in transit to the Yucca Mountain repository

DOE filed its reply to those comments ("Reply to Comments") on August 29, 2008. In opposing CSXT's requested condition, DOE acknowledged that it had adopted a policy to use dedicated trains as its "usual" mode of transporting spent nuclear fuel and high-level radioactive waste. *See* DOE Reply to Comments at 40. DOE also attached as Appendix E to its Reply to Comments a July 6, 2005 memorandum relating to the DOE Policy Statement. That memorandum states that DOE's policy is to use dedicated trains as the "usual" mode of transporting spent nuclear fuel and high-level radioactive waste.

Pursuant to the Board's regulations, 49 C.F.R. § 1104.13(a), a motion must be filed within 20 days of the matter to which it is directed. Any motion directed to DOE's Reply to Comments, therefore, was due by September 18, 2008. Norfolk Southern did not seek leave to respond to DOE's Reply to Comments by this deadline.

CSXT filed on September 18, 2008 a motion for leave to reply to DOE's Reply to Comments ("CSXT's Motion for Leave"). CSXT sought leave through that motion to address further the DOE policy regarding the use of dedicated trains. DOE filed a Reply opposing CSXT's Motion for Leave on October 8, 2008, in which DOE reiterated the policy discussed in CSXT's original comments and DOE's Reply to Comments. DOE did not identify or attach new documents to its Reply to CSXT's Motion for Leave.

Norfolk Southern filed its Motion for Leave on October 8, 2008, which seeks leave to reply to DOE's Reply to CSXT's Motion for Leave. Norfolk Southern seeks to address in its Proposed Reply DOE's policy regarding the use of dedicated trains.

### **ARGUMENT**

Norfolk Southern's Motion for Leave is procedurally improper. The Board's regulations expressly provide that a "reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). Yet, Norfolk Southern seeks leave to reply to DOE's Reply to CSXT's Motion for Leave. Norfolk Southern's Motion for Leave seeks permission to file a pleading that is entirely outside those allowed by the Board's regulations.

Norfolk Southern's Motion for Leave is also untimely. Though styled as a response to DOE's Reply to CSXT's Motion for Leave, the Proposed Response in actuality seeks to comment on matters discussed in the Application and DOE's Reply to Comments. The deadlines for commenting on the Application and filing a motion directed to the Reply to Comments have long expired.

Norfolk Southern's Motion for Leave is also factually unfounded. Norfolk Southern asserts that DOE's Reply to CSXT's Motion for Leave raises a "new position." In particular, Norfolk Southern asserts that in that Reply DOE "fundamentally altered [its] position" regarding the use of dedicated trains. Norfolk Southern's Motion for Leave at 1. That assertion is not factually accurate.

DOE did not adopt a new or changed position in its Reply to CSXT's Motion for Leave. DOE merely reiterated that its existing position is to use dedicated trains as the "usual" mode of transporting spent nuclear fuel. That is the same policy CSXT discussed in its comments on the Application and that DOE discussed in its Reply to Comments on

the Application. In short, and contrary to Norfolk Southern's assertion, DOE's Reply to CSXT's Motion for Leave did not "adopt wholly new positions or arguments in reply or rebuttal." Norfolk Southern Motion for Leave at 2.

In fact, Norfolk Southern's Proposed Response belies any assertion that DOE adopted a new position in its Reply to CSXT's Motion for Leave. Norfolk Southern identifies in its Proposed Response various statements regarding DOE's future shipments of spent nuclear fuel that Norfolk Southern claims informed its understanding. Norfolk Southern identifies there DOE's Policy Statement *See Proposed Response at 2, n 5* That is the same Policy Statement attached to CSXT's comments on the Application, and as Norfolk Southern concedes, that Policy Statement provides merely that DOE will use dedicated trains for its "usual" rail transport of spent nuclear fuel and high-level radioactive waste to the Yucca Mountain repository *Id.*

Accordingly, Norfolk Southern has failed to demonstrate good cause for its extraordinary and belated Proposed Response. DOE has not changed its policy regarding the use of dedicated trains. Nor did DOE's Reply to CSXT's Motion for Leave raise any new or different matter regarding DOE's policy.

### **CONCLUSION**

For the reasons stated above, DOE respectfully requests that the Board (1) deny Norfolk Southern's Motion for Leave; (2) not accept Norfolk Southern's Proposed Response, and (3) decide the Application on the existing record. In the event that the Board grants Norfolk Southern leave to file its Proposed Response, DOE respectfully requests an opportunity to reply on the merits to that pleading. DOE also respectfully

requests that DOE's reply time run from the date of notification of any such decision granting leave

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Mary B. Neumayr", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Mary B. Neumayr, hereby certify that I caused to be served true and correct copies of the United States Department of Energy's Reply to Norfolk Southern Corporation's Motion for Leave to File Response on each party of record on the attached list by first-class mail or more expedient service on this 29th day of October 2008.

  
Mary B. Neumayr  
Deputy General Counsel  
for Environment & Nuclear Programs

October 29, 2008



**UNITED STATES OF AMERICA**  
**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**Finance Docket No 35106**

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**UNITED STATES DEPARTMENT OF ENERGY**  
**--RAIL CONSTRUCTION AND OPERATION--**  
**CALIENTE RAIL LINE IN LINCOLN, NYE,**  
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